injured by the axe in the manner alleged; we are more than satisfied that Ramasamy's eye was never injured by a deliberate act as described.

Accordingly the appeals of all accused are allowed and their convictions are quashed.

Appeals allowed.

A. B. ESTATES LTD. v. COMPTROLLER OF INCOME TAX

[C.J. (Ali J.) February 1, 1966]

[Ipoh — Civil Appeal No. 14 of 1965]

Income Tax — Lease of estate by company to subsidiary company — Whether transaction artificial — Income Tax Ordinance, 1947, ss. 22B and 29.

This was an appeal against the decision of the Board of Review which upheld a tax assessment on the appellant company for the year 1963. The appellant company acquired a rubber estate and leased it to a subsidiary company at the annual rent of $1,200. The Comptroller of Income Tax was of opinion that the rent was unreasonably low and he assessed the appellant company on the profits earned from the estate.

Held: the comptroller had not disputed the fact that the lease was a genuine one and therefore the lease transaction could not be regarded as an artificial transaction within the meaning of section 29 of the Income Tax Ordinance; accordingly the comptroller was not entitled to disregard the transaction and the tax assessment must be annulled.

Cases referred to:—

(1) *Inland Revenue Commisioners* v. *Westminister* [1936] A.C. 1.

(2) *Russell* v. *Inland Revenue Commissioners* [1944] 2 All E.R. 192.

CIVIL APPEAL.

N. T. Rajah for the appellant.

Au Ah Wah (Treasury Solicitor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal under section 77 of the Income Tax Ordinance No. 48 of 1947 from that part of the decision of the Board of Review whereby tax assessment on the appellant company for the year 1963 was upheld.

The events which led to the present appeal may be stated as follows. The appellant company is a private company carrying on the business of rubber planting in the State of Perak. On the 29th December, 1961, it acquired a rubber estate known as S. R. Estate, which is approximately 132 acres in area, from the executors of the estate of the late G. H. at a price of $190,000. Earlier in the same month the appellant company had bought over the shares of a mining company known as K. P. M., Limited, (hereinafter referred to as "K. P. M.") which thereby became a wholly-owned subsidiary. On the 1st January, 1962, that is, two days after its acquisition by the appellant company, S. R. Estate was leased to K. P. M. at an annual rent of $1,200. The lease was for the initial period of 5 years and contained the usual covenant for the proper upkeep and maintenance of the estate and was duly drawn up, attested and registered in accordance with statutory requirements. Some eight months after the execution of the lease, the comptroller, on becoming aware of the transaction, sought to know the reason why S. R. Estate, which he considered to be a lucrative source of income, had to be leased at such a low rent. There was, in my opinion, nothing unreasonable in this enquiry as the estate was a fairly large one and was earning good profits. But the appellant company appeared to have objected to it, maintaining that it was sufficient for the comptroller's purpose to have regard only to the lease. Subsequent to this, the comptroller decided to exercise his power under section 29(1) of the Income Tax Ordinance to assess the appellant company to tax on the profits earned from S. R. Estate indicating to the effect that he was of the opinion that the lease was an artificial transaction. Although he gave no reasons for this decision, it seems to me clear from his letter that the comptroller was somewhat influenced by at least three factors:—

(1) The profits which could be earned from S. R. Estate.

(2) The rent, which he considered to be abnormally low, and

(3) The fact that the transaction was between a parent company and a wholly-owned subsidiary.

In February, 1964, presumably acting in pursuance of the provision of section 69(1), the comptroller served notice of additional assessment on the appellant company in respect of the profits earned from the estate during the years 1962 and 1963. Disputing the assessment, the appellant company promptly filed notice of objection under section 72(2), which was rejected by the comptroller. Subsequently, the appellant company appealed to the Board of Review on the following grounds:—

"The said chargeable income of $16,146 represents the income of K. P. M. Limited being the income to which K. P. M. Limited was entitled through the use of the land leased from your petitioner under the said memorandum of lease and should therefore have been included in arriving at the statutory income of K. P. M. Limited as required by the provisions of the Income Tax Ordinance.

The said assessments for 1962 and 1963 on your petitioner are made in respect of income that does not belong to your petitioner and are therefore excessive and erroneous in fact and in law. If, which is denied, the Comptroller of Income Tax is entitled to disregard the said memorandum of lease for the purpose of computing the income tax liability of your petitioner, then the Comptroller of Income Tax has erred in applying to your petitioner the commencement provisions of the Ordinance in respect of income more particularly specified in clause 7 thereof."

The Board, while upholding the appellant company's objection against the assessment for 1962, for reasons which need not be considered here, rejected the appeal in respect of the assessment for 1963. It is against this rejection that the present appeal is concerned.

From the grounds of judgment given by the Board of Review, the only question which appears to have been in issue was the meaning of the word "artificial" as used in section 29. Relying apparently on the dictionary meaning of the word, the Board construed it as describing "something which is not natural or normal or out of the ordinary", and upon this meaning of the word, the Board came to the conclusion that:—

> "The lease was a method, way, means, manoeuvre, artifice, call it what you will to reduce taxation which normally should or would have been paid by A. B. Estates Ltd.....and therefore artificial within the meaning of section 29."

This conclusion clearly proceeded on the view that it is the result and not the object of a transaction which determines its character. If that is the correct view, then any transaction which may have the effect of reducing tax payable must of necessity fall within the description of an artificial transaction. With respect, I think such a view cannot be entertained for section 29 clearly consists of two limbs. The first of these is concerned with the effect of a transaction, while the second is with its object or purpose. Now, everyone concerned in this appeal seemed to have agreed that the lease transaction in question would have the effect of reducing tax payable by the appellant company. In other words, as the subsidiary company had taken over possession of S. R. Estate, the profits derived from this estate properly belonged to it and the appellant company's liability to pay tax on these profits would thereby be reduced. Having so agreed on this question, I do not consider it necessary to make any further enquiry into it even if the circumstances in this case could possibly lead me to come to a different conclusion. Accordingly, what remains to be considered for the purpose of the present proceedings is the provision of the second limb of the section which, in my view, provides the bone of contention between the parties. This seems clear from the record of counsel's argument before the Board of Review, which appears at page 6 *et seq.* of the appeal record.

The appellant company's contention has all along been to the effect that the lease transaction was a genuine transaction entered into in good faith and for a lawful purpose. It was argued, therefore, that the comptroller was not entitled to exercise his power of assessment under section 29 unless, on evidence before him, he could reasonably come to the conclusion that the transaction was a sham transaction. Now, a sham transaction, as I understand it, is one which is mainly designed to pass off an existing state of things as other than what it really is. Such a transaction appeared to have received the consideration of Lord Tomlin in *Inland Revenue Commissioners* v. *Westminster* [1] at page 21 where he said:—

> "There may, of course, be cases where documents are not *bona fide* nor intended to be acted upon, but are only used as a cloak to conceal a different transaction. No such case is made or even suggested here. The deeds of covenant are admittedly *bona fide* and have been given their proper legal operation. They cannot be ignored or treated as operating in some different way because as a result less duty is payable than would have been the case if some other arrangement (called for the purpose of the appellant's argument 'the substance') had been made."

In that case the House of Lords was concerned with the question whether certain payments made by the Duke of Westminster to various retainers and servants were annual payments under section 27 of the English Income Tax Act, 1918, and were admissible as deductions in arriving at the liability of the Duke for surtax during certain periods. These payments were made under various deeds of covenants and written acknowledgments stamped as agreements. The Commissioners of Income Tax decided that, except as regards payment to such of the covenantees as had already left the service of the Duke, all payments under the deeds were in effect payments for services to be rendered to the Duke and were not allowable as deductions from his income. Although the Duke was not successful in his appeal in the first instance, the Court of Appeal decided in his favour reversing the decision of the Commissioners of Inland Revenue. The matter which was discussed in that case was the principle governing the construction of the covenants and the effect which the court would give to such deeds having regard to the express provisions of the English Statute relating to tax. The principle of general application appears to have been stated by Lord Tomlin in *Inland Revenue Commissioners* v. *Westminster, supra,* at page 19 in these words:—

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

Lord Atkin, who gave a dissenting judgment in the same case, appears to be in agreement with Lord Tomlin when he said at page 7:—

> "It was not, I think, denied — at any rate it is incontrovertible — that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word device in any sinister sense, for it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of

law is to determine the legal result of his dispositions so far as they affect tax."

Fortunately, in the present appeal, we do not have the same difficulty as in the case cited in having to construe the lease document in question. All that I am concerned with here is to determine whether the lease transaction, which the parties in this appeal have agreed as having the effect of reducing the tax payable, was an artificial transaction within the meaning of section 29 as hereafter construed. Section 29 provides as follows:—

"29. (1) Where the comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly....."

Coming under Part IV of the Ordinance which deals with the ascertainment of income, it is phrased in language clearly intending to cover all manner of transactions not specially provided for. In this part of the ordinance special provisions are made for the computation of income in respect of certain transactions. Section 22B, for example, deals with the computation of income as may be applied to a sale transaction between a parent company and a subsidiary. This section, however, expressly excludes such transactions to which section 29 applies. It had been argued on behalf of the comptroller that an artificial transaction was one which was not a normal business transaction, or which was not a trading activity inasmuch as profit motive was lacking. Unlike the income tax law of the United Kingdom, the law in this country does not define a business transaction or a trading activity. Nor am I aware of any express provision in the income tax law of this country where, by necessary implication, a distinction is to be drawn between what is a business transaction and what is not. In the absence of any such definition or implication, the view which I take with regard to section 22B is one which leads to a distinction between what is genuine and what is not in considering whether or not the prescribed method of computation of income under the section is applicable. A similar view, I think, can be taken of the provisions of section 27 of the Ordinance, which deals with undistributed profits of a company. Under this section the comptroller is entitled to treat such profits as distributed provided the assumed distribution would not be detrimental to the company's business. What seems significant under this section is that although the withholding of the distribution of profits results in non-payment of tax that alone is of no consequence for the law is primarily concerned with the protection of the company's business. Here again it is clearly a question of evidence whether or not the withholding of the distribution of profits is genuinely for the protection of the company's business. In much the same way can it be said of section 28(1), which deals with the computation of gains and profits resulting from the discontinuance or transfer of a business. Computation under this section is related to the price or valuation of the trading stock so transferred. Under sub-section (3) of the section the comptroller has the power to determine the valuation should any question arise. It is again a question of evidence before power can be exercised whether the price or valuation given to a particular transaction is or is not genuine. In the light of all this, I feel inclined to the view that the word "artificial" in section 29 is to be construed as intending to distinguish a transaction which is genuine and that which is not.

Having thus disposed of this question, I will now turn to the circumstances leading to the execution of the lease on the 1st January, 1962, in order to consider whether the comptroller's conclusion that it was an artificial transaction was a reasonable conclusion and one which was supported by evidence. On page 149 of the appeal record there appears what the parties describe as the agreed statement of facts. This sets out in summary form the various transactions which had been entered into by the parties concerned and which finally led to the execution of the lease. In agreeing to the facts stated, I can only assume that the comptroller accepted the declared intention which prevailed prior to the execution of the lease. I refer, of course, to the intention to absorb the tax losses of the subsidiary and to the intention of embarking on a replanting programme for the years 1966 and 1967. Although it is not clear whether these facts were known to the comptroller prior to the date of assessment this need not, I think, present much difficulty as the comptroller clearly seems to have accepted those intentions as genuine and *bona fide*. As I have stated earlier, the factors which had weighed heavily with the comptroller with regard to the lease were the large profits which could be derived from S. R. Estate, the comparatively low rent which was fixed in the lease, and the fact that it was a transaction between a parent company and a subsidiary. All these were clearly indicated in the letters from the comptroller, dated 4th October, 1963, (page 43 of the record) and dated 24th January, 1964, (page 45 of the record). In all the circumstances of the case, therefore, it is clear from the evidence on the record that there was nothing which could suggest that the lease was not a genuine transaction as falling within the description of an artificial transaction in section 29. At any rate, it was not part of the comptroller's case that it was artificial in the sense that has been construed. Thus,

apart from what Lord Tomlin has said on similar transactions in the case of *Inland Revenue Commissioners* v. *Westminster, supra,* at page 21, something to the same effect was also said by Luxmoore L.J., in the Court of Appeal in the case of *Russell* v. *Inland Revenue Commissioners,*(2) with regard to certain deeds of disposition made by a father to his children. This was a case in which various assessments were made in respect of sums claimed to have been paid for the benefit of children under three deeds of disposition. The Inland Revenue Commissioners had contended that there had not been any effective payment by the appellant of the sums stated under the deeds, or any effective charge on his income. This contention was upheld by the court of the first instance but reversed by the Court of Appeal, whose judgment was delivered by Luxmoore L.J., who said at page 196:—

"There being no attack on the genuineness or *bona fide* of the deeds.....it was not, in our judgment, open to Macnaghten J. to come to the conclusion he did."

Adopting the same view and having regard to what have been stated relating to the genuineness of the lease transaction, it was I think not open to the comptroller in this case to have come to the conclusion that the lease transaction was an artificial transaction within the meaning of section 29.

Accordingly, this appeal must be allowed with costs here and below, and there will be a direction that the tax assessment appealed against be annulled.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy, & Jones.*

ANGLO-AMERICAN CORPORATION LTD. v. GOODWOOD SAWMILL CO.

[O.C.J. (Gill J.) February 4, 1966]

[K.L. — Civil Suit No. 120 of 1964]

Hire-purchase agreement — Default in payment of instalments — Whether written notice condition precedent to termination of hiring — Retaking of possession — Claim for damages for wrongful termination.

The parties had entered into a hire-purchase agreement whereby the plaintiffs (the owners) let a cable winch tractor to the defendant company (hirer). The agreement provided that if the hirer should not pay to the owners any of the sums provided for, the owners would forthwith become entitled to immediate possession of the property. There had been default in payment and the plaintiffs had retaken possession of the cable winch tractor. They claimed arrears of hire-rent and cost of removal and the defendants counterclaimed for damages for wrongful termination of the hiring. The defendants claim was based on the fact that no notice of termination was given in this case.

Held: (1) whether a written notice is a condition precedent to the termination of a hiring in any particular case depends upon the true construction of the relevant clause in the hire-purchase agreement; a formal written notice is necessary only where there is an express stipulation to that effect in the agreement;

(2) where a notice to the hirer may be said to be an implied term of the agreement, all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration to the hirer of his intention to terminate the hiring;

(3) in this case the plaintiffs had become entitled to immediate possession of the cable winch and the actual retaking of the possession amounted to a declaration on their part to terminate the hiring.

Cases referred to:—

(1) *P.N. Pillay & Co. Ltd.* v. *Kah Motor Co. Ltd.* [1965] 1 M.L.J. 47.

(2) *Abingdon Finance Co. Ltd.* v. *Champion* Guardian, Nov. 6th 1961, [1961] C.L.Y. 3931.

(3) *North General Wagon and Finance Co. Ltd.* v. *Graham* [1950] 2 K.B. 7, 14.

(4) *Reliance Car Facilities Ltd.* v. *Roding Motors* [1952] 2 Q.B. 844.

CIVIL SUIT.

N. A. Marjoribanks for the plaintiffs.

Mah King Hock (*M. S. Chooi* with him) for the defendants.

Cur. Adv. Vult.

Gill J.: This action arises out of a hire-purchase agreement dated 6th May, 1963 whereby the plaintiffs (the owners) let a Model K565 cable winch complete with cable to the defendant company (the hirer). The plaintiffs' claim is for certain sums of money to which they allege they became entitled on their terminating the hiring by reason of the defendants' failure to comply with the terms of the agreement. The defendants are counterclaiming for damages for wrongful termination of the hiring.

Under clause 1 of the agreement the hire purchase price was $51,348, of which a sum of $13,593 was to be paid on the signing of the agreement and the balance by way of monthly hire-rent of $2,098 on the 6th day of each month, the first of such payments to be made on the 6th day of June, 1963.

Clause 4 of the agreement provided that

"If the hirer shall not duly pay to the owners any of the sums herein provided to be paid.....then the owners shall forthwith become entitled to immediate possession of the property and may in every such case: (a) without prejudice to any claim for arrears of hire-rent or damages for breach of this agreement forthwith and without notice or demand terminate the hiring and retake possession of the property; and/or (b) by written notice either served personally on the hirer or sent by post or otherwise to the hirer or to his last known address forthwith for all purposes absolutely determine and end this agreement and the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the property with the owners' consent nor shall either party thereafter have any rights under this agreement, but such determination shall not discharge any pre-existing liability of the hirer to the owners."

The amount payable under the agreement